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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1566

John W. Blasecki, Jr., William L. Brogdon, Clark Cochrane, A.J. Howard Clement, III, William Harris, Harris C. Johnson, Morris King, Benjamin Ruffin, William Service, Elizabeth Tornquist, and William Towe,

Petitioners,

v.

City of Durham, North Carolina; Vance Fisher, Mrs. R.O. Everett, C.E. Boulware, Thomas M. Hunt, Allen D. Aldridge, W.T. Coman, Charles L. Steele, J.S. Stewart, Wade Cavin, Mrs. Dillard Griffin, Paul Alford, and W.A. Biggs, the Members of the City Council of the City of Durham, North Carolina; R.W. Grabarek, Mayor of the City of Durham, North Carolina; I. Harding Hughes, City Manager of the City of Durham, North Carolina; and W.W. Pleasants, Chief of Police of the City of Durham, North Carolina.

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

John W. Blasecki, Jr., et al.,

Petitioners,

v.

City of Durham, North Carolina, et al.,

Respondents.

****

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

****

The petitioners, John W. Blasecki, Jr., et al., pray that a writ of certiorari issue to review the judgment made by the United States Court of Appeals for the Fourth Circuit, entered March 2, 1972, affirming the judgment of the United States District Court for the Middle District of North Carolina, and denying injunctive and declaratory relief to petitioners.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the Middle District of North Carolina, in this case are not yet reported. Copies of these opinions are appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

1. Are the petitioners' First Amendment rights violated by a municipal ordinance that prohibits the congregation of more than fifty people in a public park, authorizes the police to request all in excess of fifty to leave, and provides that if the excess do not leave, the entire assembly becomes unlawful?

2. Is the municipal ordinance in this case void for vagueness because it fails to designate which members of the assembly constitute the excess?

3. Did the petitioners merit equitable relief in the circumstances where a State criminal prosecution had not been commenced but had been threatened?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

N.C.G.S. 14-4

If any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00), or imprisoned for not more than thirty days.

Durham Code of Ordinances:

"An Ordinance Regulating the Use of Five Points Park in Promotion of the Public Safety, Health and Welfare"

WHEREAS, Five Points Park is not designed for or large enough in usable area to accommodate the congregation of large crowds of people at any one time; and

WHEREAS, said Five Points Park is located at the oblique intersection of Main and Chapel Hill Streets, which is one of the most used and congested areas for both pedestrian and vehicular traffic in all of the downtown area of the City of Durham; and

WHEREAS, it is especially important and necessary in the preservation of public safety, health and welfare that the streets in the Five Points area be kept open at all times for the unobstructed and unimpeded passage thereon of police and fire vehicles, ambulances, and other such public instrumentalities, and also in the public interest for the normal and orderly movement of traffic thereon; and

WHEREAS, it is also essential in the public interest that the sidewalks in said Five Points area be kept open for the lawful use of all members of the public; and

WHEREAS, the congregating of more than 50 people at the same time at Five Points Park overtaxes the reasonable capacity of said Park and

causes the overflow of persons in excess of that number to occupy the abutting sidewalks and streets, thus causing such sidewalks and streets to become obstructed, with the result of impeding and interfering with the orderly use thereof by others having a lawful right to use the same; and

WHEREAS, this Council finds and determines that it is reasonably necessary in the promotion of the public safety, health, convenience and welfare that the use of said Five Points Park be regulated by prohibiting the assembling or congregating thereon of more than 50 persons at any one time; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DURHAM:

Section 1. The assembling or congregating of more than 50 persons at any one time at Five Points Park is hereby prohibited and made unlawful.

Section 2. The law enforcement officers are hereby authorized and empowered to enforce this ordinance to the end that all persons at said Park in excess of the number permitted under the terms hereof will be required to leave the same.

Section 3. In the event an assembly or congregation present in said Park exceeds the maximum number as provided and made unlawful by Section 1 hereof, and the request of a law enforcement officer that the number of persons authorized to continue in the assembly in said Park be reduced to the permitted number and all in excess of such permitted number promptly leave, is refused or not carried out, then and in such event such law enforcement officer or officers shall advise the persons assembled that such assembly is in violation of the law, and request that all persons present disperse and leave the Park voluntarily, and if any person shall fail or refuse to disperse and promptly leave said Park in obedience to said request he shall be guilty of a misdemeanor; and in addition, such law enforcement officers shall be authorized and empowered, in such case, to use such means as are reasonably necessary and lawfully permitted to disperse such assembly and remove such persons from said Park.

Section 4. Any person violating the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by the General Statutes for violation of a municipal ordinance.

Section 5. If any part or provision of this ordinance shall be declared unconstitutional or invalid by any Court of competent jurisdiction it is the legislative intent that all other parts and provisions hereof, except that expressly so declared, shall remain in force.

Section 6. This ordinance shall be in full force and effect from and after its passage.

STATEMENT OF THE CASE

This is a class action by plaintiffs, who seek to use the Five Points Park in the City of Durham, North Carolina, for assembly and speechmaking purposes, free of the restrictions imposed by a Durham municipal ordinance. Plaintiffs sought injunctive and declaratory relief. The United States District Court for the Middle District of North Carolina, District Judge Gordon, denied the relief requested by plaintiffs and ordered that the action be dismissed in a judgment dated May 26, 1971. The District Court judgment was affirmed in an opinion of the United States Court of Appeals for the Fourth Circuit entered on March 2, 1972.

On March 24, 1969, the defendants who are members of the Durham City Council adopted the ordinance entitled "An Ordinance Regulating the Use of Five Points Park in Promotion of the Public Safety, Health and Welfare."

Plaintiffs made plans to conduct a rally at Five Points Park on Saturday, April 4, 1970, "for the purpose of protesting the increasing abuse of civil liberties in this nation." Defendant W. W. Pleasants, Chief of Police of the City of Durham, was notified of these plans by a letter dated February 25, 1970. The letter stated that 200 people were anticipated to attend the gathering.

Chief of Police Pleasants in a letter to Blasecki dated March 2, 1970, informed him of the ordinance regulating the use of Five Points Park and pointed out that the anticipated number of persons present would exceed the number permitted by the ordinance.

In a letter to Chief Pleasants dated March 16, 1970, Blasecki gave notice of a change of date for the rally to May 1, 1970, stating that the anticipated number of persons who would participate remained the same. Chief of Police Pleasants replied to this correspondence by a letter dated March 23, 1970, in which he advised Blasecki to "be sure that there are not over 50 persons assembled in the Five Points Park."

Blasecki wrote a final letter dated April 29, 1970, to Chief Pleasants stating that the group had decided to cancel the rally scheduled for May 1, 1970, since Chief Pleasants had specifically advised that the Five Points Park ordinance would be enforced, and it was thought by the

group that the ordinance was unconstitutional and its application would open the "group to the possibilities of violence and disruption from external sources."

Plaintiff Blasecki's testimony is that he and others in groups substantially exceeding 50 persons in number continue to desire to hold marches and meetings and other public, political, and peaceful occasions of assembly and speechmaking continuing for an indefinite time in the future, and that the ordinance regulating the use of Five Points Park and the assured enforcement of this ordinance, will have a continuing effect of deterring the plaintiffs and their class from carrying out these activities.

Five Points Park is generally triangular in shape. There are a total of 2,604 square feet of usable space in the park free from obstructions. (The total area of the park is 4,260 square feet; seats, beds for planting, shrubbery, trees, lights, steps, and other areas take up 1,404 square feet, and the steps leading from the sidewalk down into the park occupy 250 square feet. These measurements are exclusive of the sidewalks and curbing bordering the streets.) The park is bounded on one side by a brick building, on another side by Chapel Hill Street, and on the third side by Main Street. The park is owned by the City of Durham.

Four assemblages of persons are known to have occurred at the Five Points Park

since it was constructed in 1967. (1) On February 15, 1968, a group of 300 marchers protesting the shooting of college students at Orangeburg, South Carolina, burned two caskets under trees in the park and partially burned the trees. Some of the persons present in the park on that occasion interfered with efforts of firemen to extinguish the blazing materials, and some of these persons were doused with water by the firemen. Later some of the persons present damaged shrubbery and water sprinkler heads in the park, and broke out store windows in the downtown area. (2) On May 9, 1968, between 100 and 150 persons gathered in the park for a memorial service in honor of Governor Lurleen Wallace. Some of the persons present attempted to lower to half mast the flag flying in the park, but policemen prevented them from doing this. (3) On March 11, 1969, 200 or 300 persons gathered in the park to protest segregation in higher education. On this occasion, again, shrubbery and sprinkler heads were damaged, and later store windows in the downtown area were broken. (4) During the summer of 1968, the Durham citizens for McCarthy held an open house in the park. Cake and lemonade were served, and balloons and leaflets were passed out.

At the meeting of the Durham City Council on March 24, 1969, while the Five Points Park ordinance was under consideration, defendant Chief of Police Pleasants was asked what number of people

the police could handle at Five Points. He replied that, "naturally the police would have more trouble if there are 500 than would have if there were 50 people . . . .[I]f there were 50 or 100, if it is lawful, the police could take care of this."

ARGUMENT

1. The petitioners' First Amendment rights are violated by a municipal ordinance that prohibits the congregation of more than fifty people in a public park, authorizes the police to request all in excess of fifty to leave, and provides that if the excess do not leave, the entire assembly becomes unlawful.

The ordinance of the City of Durham regulating the use of Five Points Park brings into direct conflict the right of the state to legislate for the good and safety of the public, and the right of citizens to freedom of speech and assembly. In the presence of such a conflict, the two rights must be balanced and the more vital one must prevail.

In controlling the size of demonstrations and assemblies in Five Points Park, the City of Durham seeks to protect public and private property from destruction,and to protect the general population of the city from additional congestion in an already crowded downtown area.

In seeking to assemble a group of more than fifty persons in Five Points

Park the petitioners ask only that they be permitted to gather and discuss public issues in that area of the city in which they will reach the largest audience.

Though the City of Durham certainly has a duty to control traffic congestion and to prevent the destruction of property, both public and private, within its boundaries, petitioners assert that these duties should not be carried out through the establishment of a system of prior restraints on freedom of speech and assembly.

In asserting the supremacy of their right to assemble peaceably and discuss issues of public importance, petitioners rely on the leading decision of Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-516, 83 L.ed. 1923, 59 S.Ct. 954 (1939), in which the enforcement of a municipal ordinance prohibiting public assemblies was enjoined, and the Court declared that the public parks are irrevocably dedicated for use by the citizens in political communication:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purpose of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of

> citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with the peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Thus, petitioners' right to use the public parks as forums for the discussion of questions of national importance is well established. Equally well established is the fact that this right can be regulated in the public interest. The issue, then, is when is the regulation of speech and assembly allowed.

Any attempt to restrict First Amendment liberties "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Thomas v. Collins, 323 U.S. 516, 530, 89 L.ed. 430, 65 S.Ct. 315 (1945).

The City of Durham has made no showing that a gathering such as the one the petitioners wish to hold poses a clear and present danger of a threat to the public interest. Indeed, under the ordinance in question, no such showing can ever be made. The ordinance imposes a prior restraint upon all gatherings of more than fifty persons, not only those gatherings which present a threat to public well-being.

Assuming, however, that the City can show that such a threat exists, are the interests sought to be protected paramount in importance to petitioners' First Amendment liberties?

The stated purpose of the ordinance is to control the flow of traffic and prevent congestion. In other cases, this Court has allowed interference with the free flow of vehicles and pedestrian traffic where the price to be paid for uncongested traffic was the abridgment of First Amendment freedoms.

In Edwards v. South Carolina, 372 U.S. 229, 9 L.ed.2d 697, 83 S.Ct. 680 (1963), a large demonstration was held on the State capital grounds in Columbia, South Carolina. One of the results of this demonstration was a slowing of vehicular traffic at a nearby intersection. This inconvenience was eased by the presence of local police officers who directed traffic through the intersection. In that case, the Supreme Court refused to uphold the demonstrators' conviction of common law breach of peace. The right to assemble peaceably was found superior to the general population's right to uncongested intersections in a downtown area. The petitioners contend that this should be the case in Durham, as well. "Freedom of speech is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far

above public convenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4, 93 L.ed. 1131, 69 S.Ct. 894 (1949).

Even assuming that the public desire for uncongested traffic in downtown areas rises to the dignity of First Amendment liberties, petitioners contend that the public would be better served if the state were to deal with traffic violations as they actually occur rather than attempting to prevent them by establishing a system of prior restraints on freedom of speech and assembly. The City of Durham cannot know that the meeting proposed by petitioners will result in traffic congestion; nor can it know that this specific gathering of people will result in the destruction of property. It is not permissible for the city to assume that these evils will be the necessary result of large assemblies and then to prevent the evil by forbidding the assembly. "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment." Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 180-181, 89 S.Ct. 347, 21 L.ed.2d 325 (1968).

The City of Durham has an adequate arsenal of criminal penalties which may be imposed for violation of the right of peaceful assembly. The Durham City Code of Ordinances contains prohibitions against cutting and defacing trees (Section 23-5); depositing garbage and paper upon the streets (Section 9-30); possessing and drinking intoxicating beverages in public places (Section 13-12); public drunkenness, disorderly or unbecoming conduct (Section 13-13); unreasonably loud, disturbing, and unnecessary noises (Section 13-17); the use of sound amplifying devises (Section 13-18); breaking of glass bottles in public places (Section 13-24); dumping rubbish and trash in public places (Section 13-25); use of indecent, profane, or vulgar language in public places (Section 13-27); the discharge of firearms (Section 13-29). Also the ordinances require permits for parades and processions (Section 12-8). The General Statutes of North Carolina provide criminal penalties for many acts that could be anticipated to occur in connection with a public assembly, such as wearing masks and hoods, and burning crosses, G. S. 14-12.7 et seq.; assaults and affrays, G. S. 14-32 et seq.; malicious use of explosive devices, G. S. 14-49 et seq.; malicious burning of real and personal property, G. S. 14-62, 66; making false reports concerning destructive devices, G. S. 14-69.1; larceny of property, G. S. 14-70; wilful and wanton injury to real property, G. S. 14-127; injuring gas, electric and telephone fixtures, G. S. 14-151, et seq.;

wilfull injury to personal property, G. S. 14-160; using profane language on public highways, G. S. 14-197; carrying concealed weapons, G. S. 14-269; giving false fire alarms, G. S. 14-286; making false ambulance requests, G. S. 14-286.1; rioting and inciting to riot, G. S. 14-288.2; disorderly conduct, G. S. 14-288.4; public drunkenness and disorderliness, G. S. 14-334; and placing trash on public roads, G. S. 14-339.

These ordinances and statutes adequately punish any harmful conduct which could conceivably grow out of a public assembly. Certainly it is preferable in a democracy where a high premium is placed upon the rights of speech and assembly to punish wrongdoing rather than to forbid the assembly.

2. The municipal ordinance in this case is overly vague because it fails to designate which members of the assembly constitute the excess.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law. "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercising of individual freedoms affirmatively protected by the Constitution. . . '[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially

inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.'" Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 7 L.ed.2d 285, 82 S. Ct. 275, 287 (1961). "First Amendment freedoms. . . are delicate and vulnerable, as well as supremely precious in our society. The threat of sanction may deter their exercise almost as potently as the actual application of sanctions. . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371 U.S. 415, 433, 9 L.ed.2d 405, 83 S.Ct. 328 (1963).

The Five Points Park ordinance prohibits the congregation of more than fifty persons at any one time in the park; provides that a law enforcement officer may request all in excess of fifty persons to leave the park promptly; and provides that if the "excess" persons do not leave at that time, the law enforcement officer must announce that the assembly is unlawful, and must request all persons present to disperse and leave the park. North Carolina statutes make violation of a municipal ordinance a misdemeanor punishable by a $50.00 fine or thirty days in jail. N.C.G.S. 14-4 (1969).

The words of the ordinance leave unclear the meaning of the word "excess." Are only people taking part in the demonstration to be counted in determining

whether there are more than fifty people in the park, or should people who are there for other purposes be included in the count as well? If everyone is counted, who should be the "excess"--people there to exercise their First Amendment liberties, or people who are in the park to wait for a bus or meet a friend? If only members of the assembly are counted, which members constitute an excess-- the first to arrive, the last to arrive, those on the fringes of the crowd?

The ordinance might also be interpreted as authorizing law enforcement officers to disperse the entire assembly once they have followed the required procedure in requesting the "excess" persons to leave. This would be tantamount to closing a park, dedicated to the public use, to peaceful assembly.

A statute or ordinance capable of such varied interpretations must require men of common intelligence to guess at its meaning. Those who guess wrongly run the risk of a fine or jail sentence. This threat is sufficiently severe to stop many people from the lawful exercise of their First Amendment freedoms.

3. Petitioners merit equitable relief in the circumstances where a state criminal proceeding had not been commenced, but had been threatened.

Because criminal prosecution had not actually been commenced against petitioners, recent decisions of this Court do not disturb petitioners' rights to equitable and declaratory relief.

Younger v. Harris, 401 U.S. 37, 27 L.ed.2d 669, 91 S.Ct. 746 (1971), held that a pending state criminal prosecution could not be enjoined, except under extraordinary circumstances where the danger of irreparable injury is great and immediate. Mr. Justice Black writing for the Court said, "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 27 L.ed.2d 674. Here there was no pending prosecution under the Five Points Park ordinance.

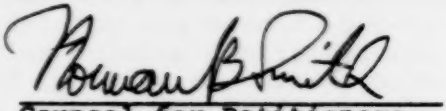
There was, however, the repeated assurance by defendant Chief of Police Pleasants that the assembly of more than fifty persons in the park at petitioners' proposed rally would result in the invocation of the statute. Because of the preparedness and ability of the police to enforce the ordinance at the impending public assembly, this action is ripe for adjudication. Plaintiffs have suffered irreparable harm which entitles them to injunctive relief, as a result of the threats to prosecute them for engaging in the exercise of First Amendment rights.

Where there is no pending state criminal prosecution, and yet prosecution is threatened, it remains indisputably the law that infringement of the rights of free speech and assembly are to be redressed by the federal courts, exercising

their equitable powers. Hague v. Committee for Industrial Organization, 307 U.S. 496, 83 L.ed. 1423, 59 S.Ct. 954 (1939).

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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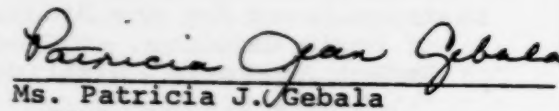

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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1615

John W. Blasecki, Jr., et al.,

Appellants,

vs.

City of Durham, North Carolina, et al.,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued December 7, 1971. Decided March 2, 1972.)

Before BOREMAN, Senior Circuit Judge, and WINTER and CRAVEN, Circuit Judges.

Norman B. Smith (Smith and Patterson on brief) for Appellant, and Claude V. Jones for Appellees.

CRAVEN, Circuit Judge:

This is an appeal by plaintiffs, citizens and residents of the City of Durham, North Carolina, from a decision of the District Court for the Middle District of North Carolina holding constitutional an ordinance of the City of Durham which prohibits more than 50 people from assembling or congregating at Five Points Park. We affirm.

Five Points Park lies between Main Street and Chapel Hill Street near the center of downtown Durham. It is owned by the City of Durham. It is a new city park located on the site of an old wedge-shaped building torn down in 1967. The park is roughly triangular in shape with a total area of 4,260 square feet, which does not include a strip around its edge constituting space equal to that normally alloted for a sidewalk. The total unobstructed area of the park, excluding seats, trees, lights, etc., is 2,604 square feet.

From the time of its construction in 1967, four organized assemblages of people are known to have used the park. Two were disruptive requiring police intervention and two were peaceful. On the night of February 15, 1968, some 300 people met in the park and burned a casket as a symbol of protest against grievances. Firemen

were prevented from extinguishing the casket by members of the crowd, who locked arms around it, and a tree caught on fire. Members of the assembly broke a number of glass store windows near the park. The damage to the park itself included burned trees (ignited by the casket), broken water sprinkler heads, and torn shrubbery.

The other disruptive demonstration occurred on the night of March 11, 1969. One store window was broken and shrubbery and sprinkler heads in the park were damaged.

On March 24, 1969, the Durham City Council adopted the ordinance which the plaintiffs challenge. It reads as follows:

> WHEREAS, Five Points Park is not designed for or large enough in usable area to accomodate the congregation of large crowds of people at any one time; and
>
> WHEREAS, said Five Points Park is located at the oblique intersection of Main and Chapel Hill Streets, which is one of the most used and congested areas for both pedestrian and vehicular traffic in all of the downtown area of the City of Durham; and
>
> WHEREAS, it is especially important and necessary in the preservation of public safety, health and welfare that the streets in

the Five Points area be kept open at all times for the unobstructed and unimpeded passage thereon of police and fire vehicles, ambulances, and other such public instrumentalities, and also in the public interest for the normal and orderly movement of traffic thereon; and

WHEREAS, the congregating of more than 50 people at the same time at Five Points Park overtaxes the reasonable capacity of said Park and causes the overflow of persons in excess of that number to occupy the abutting sidewalks and streets, thus causing such sidewalks and streets to become obstructed, with the result of impeding and interfering with the orderly use thereof by others having a lawful right to use the same; and

WHEREAS, this Council finds and determines that it is reasonably necessary in the promotion of the public safety, health, convenience and welfare that the use of said Five Points Park be regulated by prohibiting the assembling or congregating thereon of more than 50 persons at any one time; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DURHAM:

Section 1. The assembling or

congregating of more than 50 persons at any one time at Five Points Park is hereby prohibited and made unlawful.

Section 2. The law enforcement officers are hereby authorized and empowered to enforce this ordinance to the end that all persons at said Park in excess of the number permitted under the terms hereof will be required to leave the same.

Section 3. In the event an assembly or congregation present in said Park exceeds the maximum number as provided and made unlawful by Section 1 hereof, and the request of a law enforcement officer that the number of persons authorized to continue in the assembly in said Park be reduced to the permitted number and all in excess of such permitted number promptly leave, is refused or not carried out, then and in such event such law enforcement officer or officers shall advise the persons assembled that such assembly is in violation of the law, and request that all persons present disperse and leave the Park voluntarily, and if any person shall fail or refuse to disperse and promptly leave said Park in obedience to said request he shall be guilty of a misdemeanor; and in addition,

such law enforcement officers shall be authorized and empowered, in such case, to use such means as are reasonably necessary and lawfully permitted to disperse such assembly and remove such persons from said Park.

Section 4. Any person violating the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by the General Statutes for violation of a municipal ordinance.

Section 5. If any part or provision of this ordinance shall be declared unconstitutional or invalid by any Court of competent jurisdiction it is the legislative intent that all other parts and provisions hereof, except that expressly so declared, shall remain in force.

Section 6. This ordinance shall be in full force and effect from and after its passage.

For nearly a year there were apparently no efforts to assemble in Five Points Park, but on February 25, 1970, plaintiff Blasecki, Chairman of the Durham Alliance, wrote to the Durham Chief of Police, defendant W.W. Pleasants, requesting a permit to conduct a rally in Five Points Park.[1] When permission

1. The following is the text of the correspondence between plaintiff Blasecki and defendant Pleasants:

was denied (as to assembling more than 50 persons) the rally was called off and this class action instituted.

(Footnote 1 continued)

February 25, 1970

Chief W. W. Pleasants
Durham City Police Department
314 North Mangum Street
Durham, North Carolina

Dear Chief Pleasants:

On behalf of the Durham Alliance, an organization dedicated to the promotion of justice for all under law, I would like to inform you that it is our intention to hold a march and rally on Saturday, April 4, 1970, at 2 o'clock P.M., for the purpose of protesting the increasing abuse of civil liberties in this nation. Our tentative plan is to assemble at East Parrish and Roxboro Streets, proceeding from that point to Main Street and then west on Main Street to a rally in Five Points Park. It is anticipated that the rally will draw about 200 people.

Please consider this letter an application for a permit to hold the above mentioned events. We would appreciate having such permit by March 21, 1970.

Very truly yours,

J. W. Blasecki, Jr., Chairman
Durham Alliance

(continued on page 29)

I

The plaintiffs contend that this ordinance violates their freedom of speech and right of assembly in contravention of

(Footnote 1 continued)

March 2, 1970

Mr. J. W. Blasecki, Jr.
Durham Alliance
P. O. Box 2990
Duke Hospital
Durham, North Carolina

Dear Mr. Blasecki:

In answer to your letter of February 25, 1970 in regards to the proposed rally on Saturday, April 4, 1970 I would like to state the following:

If your intentions are for your group to march or walk in the street as a parade I cannot issue you a permit. The policy of the Durham City Council prohibits any parade on Saturdays that are not completed by 11 A.M. unless special permission is granted by the City Council. To have a parade after 11 A.M. on Saturday you would have to go before the City Council and get special permission.

If your intentions are for your group to march or walk down the sidewalk from Parrish Street to Five Points there is no restrictions

(continued on page 30)

the First Amendment because, by limiting the number of people who can assembly (sic) in Five Points Park to 50, the ordinance,

(Footnote 1 continued)

on this type of march so long as the laws and ordinances dealing with the use of the public streets are not violated. This in part would mean that the marchers would not be over two abreast and that they would not block or utilize over half of the sidewalk so that other people desiring to use the sidewalk could do so, and also that the marchers would abide by the traffic lights as anyone else would do who are using the public streets and sidewalks.

I must also remind you of an ordinance regulating the use of the Five Points Park. The ordinance prohibits the assembly of over fifty persons in the park and from your anticipated number you would have entirely too many people congregated in this area. We cannot permit the streets and sidewalks to be used for assembly.

I am attaching a copy of the ordinance with reference to the use of Five Points Park. Be sure to advise me as to your intentions on this matter.

Sincerely,

W. W. Pleasants, Chief of Police

(continued on page 31)

"in the guise of regulating the use of the park, purportedly in the interest of public order and convenience, has the effect

(Footnote 1 continued)

March 16, 1970

Chief W. W. Pleasants
Durham City Police Department
P. O. Box 649
Durham, North Carolina 27702

Dear Chief Pleasants:

Thank you for your letter of March 2, 1970. This is to notify you that I have changed the date of our rally to Friday, May 1, 1970, at the same time. I do not anticipate that any of the laws or ordinances will be violated by the marchers.

All other conditions with regard to assembly, march route, rally site and anticipated number of persons participating remain the same as set forth in my letter of February 25, 1970. I would like the permit for these events to be granted on that basis and would appreciate your reply by April 1, 1970.

Very truly yours,

J. W. Blasecki, Jr., Chairman
Durham Alliance

(continued on page 32)

of abridging and denying these constitutional entitlements."

It is clear that by limiting the number of people who can assemble in Five

(Footnote 1 continued)

March 23, 1970

Mr. J. W. Blasecki, Jr.
Durham Alliance
P. O. Box 2990
Duke Hospital
Durham, North Carolina

Dear Mr. Blasecki:

Re: Rally Friday May 1, 1970

I understand the route that you want to take and the time but you have not made it clear if you are requesting a parade permit whereby you would use a portion of the public street or if your group is going to march down the sidewalk. If you wish to parade in the street you will have to have a permit and the parade will have to be over by 3 P.M. If you are going to march down the sidewalk you do not have to have a permit and there is no specific time that the march has to be concluded. You do not have to have a permit to assemble at Five Points, but be sure that there are not over 50 persons assembled in the Five Points Park.

I need to know if you want a parade permit

(continued on page 33)

Points Park, the City of Durham has restricted freedom of speech and assembly of these plaintiffs and their class. It is

(Footnote 1 continued)

or not so that we can arrange for an escort to work traffic. If you are going to march down the sidewalk you will not need a motorized escort. Please advise me of your exact intentions in this matter.

Sincerely,

W. W. Pleasants, Chief of Police

April 29, 1970

Chief W. W. Pleasants
Durham City Police Department
P. O. Box 649
Durham, North Carolina 27702

Dear Chief Pleasants:

In reply to your previous letter, I would like to inform you that we have decided to cancel our protest march and rally scheduled for May 1, 1970. Considering our purpose, we feel that regardless of the peacefulness of our intent, the Five Points Ordinance, as written, definitely opens our group to the possibilities of violence and disruption from external sources. This would both negate our aim

(continued on page 34)

equally clear that "[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time." Cox v. Louisiana, 379 U.S. 536, 544 (1965).

We agree with plaintiffs that whenever the state restricts the right of assembly its action is to be reviewed without the presumption of constitutionality which is accorded legislative judgments in less crucial areas. United States v.

(Footnote 1 continued)

and endanger the lives of those in our group, which is neither our intent nor a risk which we desire to take. We also feel the aforementioned ordinance to be unconstitutional, and to be so vaguely written as to make enforcement either impossible or purely arbitrary.

For these reasons we are instituting action in Federal District Court to enjoin the City of Durham from enforcing said ordinance. We hope to reschedule our march and rally at such later date that the situation has been duly rectified.

Very truly yours,

J. W. Blasecki, Jr., Chairman
Durham Alliance

Congress of Industrial Organizations, 335 U.S. 106 (1948). Not only is there no presumption, the constitutional standard is different. It is not enough that legislation may be rationally related to a legitimate state purpose; the state must have a compelling interest in the subject matter to justify abridgment, and the scope of the abridgment itself must not be greater than reasonably necessary to serve the state interest. Thomas v. Collins, 323 U.S. 516, 530 (1945).

We have no difficulty with the first ingredient. Destruction of property, both public and private, had occurred on two out of four occasions when the park had been used for public assembly. The state's interest in the protection of property is a compelling one. So also is its interest that there will not be prolonged and uncontrolled congestion of main downtown arteries of vehicular and pedestrian traffic. Five Points is to Durham what Times Square is to New York. Prolonged and uncontrolled blockage of traffic at such a point can paralyze a city. See Cox v. Louisiana, supra, at 554, where the Court said, "Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." This is not a case of abridgement of the privilege of a citizen to use the streets and parks for political discussions "in the guise of regulation...." Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-516 (1939).

Here the problem is fully documented by the record which supports the inference that this ordinance was enacted to keep public order in an extremely congested downtown area.[2] The city has never required a permit to use the park, and the correspondence between plaintiff Blasecki and defendant Pleasants indicates a helpful, cooperative attitude and a willingness to assist plaintiffs in every way short of violation of the ordinance.[3]

II

The harder problem is whether, assuming a compelling state interest in the enactment of the ordinance, it sweeps overbroadly and cuts unnecessarily deep into First Amendment freedom.

Plaintiffs advance two arguments for the proposition that the number limitation (50 persons) is an unconstitutional limitation on the freedom of speech and right of assembly. They claim that statistical evidence shows the park can physically accomodate more than 50 people and that an ordinance which limits the number to 50 unnecessarily is unconstitutional.

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2. In addition to the normal pedestrian traffic which would be found in any downtown area, the Five Points Park is utilized by many people who wait for buses since the Five Points Park area is a major bus stop in the City of Durham.

3. See note 1 supra.

The second argument is that the ordinance is unnecessary because the State of North Carolina and the City of Durham already have laws and ordinances which prohibit all harmful conduct which could conceivably result from a public assembly.

We think that, if the City of Durham is permitted to set any limitation at all upon the number of people that may gather in Five Points Park, it is entitled to consider factors other than the physical size of the area and the number of people it will hold standing up if no one shoves, pushes, or locks arms. The center city location of the park, traffic conditions, the location and size of other parks and places available for public assembly and the relative increase in the possibility of danger to the public and property as the size of the crowd increases are but a few of the many factors which could enter into such a determination. Perhaps the

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4. In A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969), the fact that statistical evidence showed the south sidewalk of Pennsylvania Avenue could contain far more than the 100 persons limit, and Lafayette Park could contain far more than the 500 persons limit placed on demonstrations in each place by the National Park Service, was taken into consideration in determining that the trial judge had not abused his discretion by permitting demonstrations larger than that permitted by the regulations. In that case, however, the disparity between that permitted and that arguably

(continued on page 38)

Perhaps the most significant factor of all would be the normal use of Five Points Park without any scheduled rally, i.e., how many people are there waiting for rides, buses, or using the park as a concourse or pausing in the center of the city. Police estimates of the number of people they could handle are likewise relevant but not determinative.[5]

The plaintiffs seem to realize that if a line is to be drawn at all with regard to numbers, it must be drawn somewhere, so their second argument is that no line may constitutionally be drawn. By arguing that the ordinance is overbroad because the state already has laws by which to punish any harmful conduct which may arise from a public assembly,

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(Footnote 4 continued)

possible was far greater than in the case before us. In addition, probably a more important factor in granting the injunction against the enforcement of these regulations was the evidence that the National Park Service had arbitrarily denied permits to groups whose size did not exceed the regulation limits. Both the requiring of permits and capricious enforcement are absent from the case before us.

5. The only evidence regarding capacity of the park is that defendant Pleasants told the City Council the police could handle 50 to 100 people, but it is unclear whether he was speaking of the park alone or of the entire Five Points area.

the plaintiffs urge us to accept the proposition that the state may not constitutionally set a limit on the number of people in a public place without regard to what they may be doing. We disagree. Public assemblies are not accorded absolute immunity from prior restraint accorded to freedom of the press nor as high a degree of protection as that afforded to speech unaccompanied by concurrent action. For the reasons stated by the Court in Cox v. Louisiana, 379 U.S. 559, 563-66 (1964), we think that it is constitutionally permissible for the City of Durham to place a reasonable limit on the number of people who can assemble in Five Points Park. In finding that 50 was a not unreasonable limitation we think the district judge on the whole record was not clearly erroneous.

III

Plaintiffs also contend the ordinance is void for vagueness. Their argument is that the ordinance, "prohibits the congregation of more than 50 persons at any one time in the park; provides that a law enforcement officer may request all in excess of 50 persons to leave the park promptly; provides that if the 'excess' persons do not leave at that time, the law enforcement officer must announce that the assembly is unlawful, and must request all persons to disperse and leave the park; and makes it a misdemeanor for any person to refuse to leave the park in obedience to the order." Plaintiffs urge that the ordinance is unconstitutionally vague because it fails to define which

people constitute the "excess". While it might be possible to interpret this ordinance as imposing criminal sanctions upon the "excess", it is elementary that if more than one interpretation is possible, the one which will permit upholding the constitutionality of the statute should be chosen. United States v. Harriss, 347 U.S. 612 (1954). It is also elementary that a United States court cannot interpret authoritatively and finally a state criminal ordinance. We think it inappropriate that we should attempt interpretation because one of the special circumstances making abstention appropriate "is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question." Zwickler v. Koota, 389 U.S. 241, 249 (1967).

Although we decline to interpret, it is obvious, for example, that the 50 person limitation in the ordinance might be held to contemplate people who have the intent to be gathered in the Five Points Park in some organized manner as compared to people who are waiting for buses or walking through the park. A state court might also reasonably hold that no person can be arrested and charged with violation of this ordinance until the police, following the procedure outlined in the ordinance, have ordered the entire assembly, not just the "excess", to disperse and the person fails to do so. From the standpoint of protecting First Amendment rights, the provision in the ordinance calling for the excess to leave before the assembly is required to disperse would be a more acceptable alternative

to forcing the assembly to disperse immediately upon its growing larger than 50 people. While there may be some doubt in each individual's mind as to whether he is part of the "excess" and should leave, we do not think this possible uncertainty would offend due process to the extent that the entire ordinance is void in view of the fact that no criminal penalty appears to attach to the failure to leave at this point.

The judgment of the district court declaring the ordinance constitutional will be

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DURHAM DIVISION

JOHN W. BLASECKI, JR., et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	No. C-84-D-70
	)	
CITY OF DURHAM, NORTH CAROLINA, et al.	)	
	)	
	)	
Defendants	)	

MEMORANDUM OPINION

GORDON, District Judge

In downtown Durham, North Carolina, within the vicinity known as Five Points, there is a generally triangular plot of land once occupied by a flatiron building. In 1967 the Redevelopment Commission for the City of Durham razed the building and fashioned in its place an ornamental park. Dimensionally, the park measures as follows: "On its eastern end abutting a brick building there is a distance of 79 feet, 3 inches, from Main Street to Chapel Hill Street. Along the south side of Chapel Hill Street in a westwardly direction the distance is 78 feet, 8 inches. The western end is 30 feet, 9 inches wide between Main Street and Chapel Hill Street. The southern line or distance is 84 feet, 2 inches, along the north side of Main Street."[1]

1 Stipulation of the parties

Approximately a third of the park area is occupied by seats, lights, and beds for the planting of shrubbery and trees.

On four occasions, this park became the site of group activity. Twice disorderliness and destruction of property resulted, both inside the park and in the surrounding vicinity.

On March 24, 1969, the City Council of Durham adopted an ordinance prohibiting gatherings of more than fifty people in the park at any one time. One reason given for this limitation was that the park was not sizable enough nor designed to accommodate large crowds. Another reason was that being located on an oblique corner of a five street intersection, it was situated in one of the most congested areas of the city. The ordinance states:

> "[T]he congregating of more than 50 people at the same time at Five Points Park overtaxes the reasonable capacity of said Park and causes the overflow of persons in excess of that number to occupy the abutting sidewalks and streets, thus causing such sidewalks and streets to become obstructed, with the result of impeding and interfering with the orderly use thereof by others having a lawful right to use the same. . ."

The City Council has never granted special permission to any group wishing

to use the park since the ordinance was adopted. Nor have criminal prosecutions relating to this ordinance ever been instituted.

The present action arose following correspondence between John W. Blasecki, Jr., one of the named plaintiffs, and W. W. Pleasants, Durham's Chief of Police. Following is the text of that correspondence.

"Box 2990
Duke Hospital
Durham, North Carolina
February 25, 1970

"Chief W. W. Pleasants
Durham City Police Department
314 North Mangum Street
Durham, North Carolina

"Dear Chief Pleasants:

"On behalf of the Durham Alliance, an organization dedicated to the promotion of justice for all under law, I would like to inform you that it is our intention to hold a march and rally on Saturday, April 4, 1970, at 2 o'clock P.M., for the purpose of protesting the increasing abuse of civil liberties in this nation. Our tentative plan is to assemble at East Parrish and Roxboro Streets, proceeding from that point to Main Street and then west on Main Street to a rally in Five Points Park. It is anticipated that the rally will draw about 200 people.

"Please consider this letter an application for a permit to hold the above mentioned events. We would appreciate having such permit by March 21, 1970.

"Very truly yours,

"J. W. Blasecki, Jr., Chairman
Durham Alliance"

"March 2, 1970

"Mr. J. W. Blasecki, Jr.
Durham Alliance
P. O. Box 2990
Duke Hospital
Durham, North Carolina

"Dear Mr. Blasecki:

"In answer to your letter of February 25, 1970 in regards to the proposed rally on Saturday, April 4, 1970 I would like to state the following:

"If your intentions are for your group to march or walk in the street as a parade I cannot issue you a permit. The policy of the Durham City Council prohibits any parade on Saturdays that are not completed by 11 A.M. unless special permission is granted by the City Council. To have a parade after 11 A.M. on Saturday you would have to go before the City Council and get special permission.

"If your intentions are for your group to march or walk down the sidewalk from Parrish Street to Five Points there is no restrictions on this type of march so long as the laws and ordinances dealing with the use of the public streets are not violated. This in part would mean that the marchers would not be over two abreast and that they would not block or utilize over half of the sidewalk so that other people desiring to use the sidewalk could do so, and also that the marchers would abide by the traffic lights as anyone else would do who are using the public streets and sidewalks.

"I must also remind you of an ordinance regulating the use of the Five Points Park. The ordinance prohibits the assembly of over fifty persons in the park and from your anticipated number you would have entirely too many people congregated in this area. We cannot permit the streets and sidewalks to be used for assembly.

"I am attaching a copy of the ordinance with reference to the use of Five Points Park. Be sure to advise me as to your intentions on this matter.

"Sincerely,

"W. W. Pleasants, Chief of Police."

"March 16, 1970

"Chief W. W. Pleasants
Durham City Police Department
P. O. Box 649
Durham, North Carolina 27702

"Dear Chief Pleasants

"Thank you for your letter of March 2, 1970. This is to notify you that I have changed the date of our rally to Friday, May 1, 1970, at the same time. I do not anticipate that any of the laws or ordinances dealing with the use of public streets and sidewalks will be violated by the marchers.

"All other conditions with regard to assembly, march route, rally site and anticipated number of persons participating remain the same as set forth in my letter of February 25, 1970. I would like the permit for these events to be granted on that basis and would appreciate your reply by April 1, 1970.

"Very truly yours,

"J. W. Blasecki, Chairman
Durham Alliance"

"March 23, 1970

"Mr. J. W. Blasecki, Jr.
Durham Alliance
P. O. Box 2990

Duke Hospital
Durham, North Carolina

"Dear Mr. Blasecki:

"Re: Rally Friday May 1, 1970

"I understand the route that you want to take and the time but you have not made it clear if you are requesting a parade permit whereby you would use a portion of the public street or if your group is going to march down the sidewalk. If you wish to parade in the street you will have to have a permit and the parade will have to be over by 3 P.M. If you are going to march down the sidewalk you do not have to have a permit and there is no specific time that the march has to be concluded. You do not have to have a permit to assemble at Five Points, but be sure that there are not over 50 persons assembled in the Five Points Park.

"I need to know if you want a parade permit or not so that we can arrange for an escort to work traffic. If you are going to march down the sidewalk you will not need a motorized escort. Please advise me of your exact intentions in this matter.

"Sincerely,

"W. W. Pleasants, Chief of Police"

"April 29, 1970

"Chief W. W. Pleasants
Durham City Police Department
P. O. Box 649
Durham, North Carolina 27702

"Dear Chief Pleasants:

"In reply to your previous letter, I would like to inform you that we have decided to cancel our protest march and rally scheduled for May 1, 1970. Considering our purpose, we feel that regardless of the peacefulness of our intent, the Five Points Ordinance, as written, definitely opens our group to the possibilities of violence and disruption from external sources. This would both negate our aim and endanger the lives of those in our group, which is neither our intent nor a risk which we desire to take. We also feel the aforementioned ordinance to be unconstitutional, and to be so vaguely written as to make enforcement either impossible or purely arbitrary.

"For these reasons we are instituting action in Federal District Court to enjoin the City of Durham from enforcing said ordinance. We hope to reschedule our march and rally at such later date that the situation has been duly rectified.

"Very truly yours,

"J. W. Blasecki, Jr., Chairman
Durham Alliance"

The plaintiffs have prayed for injunctive relief and for a judgment declaring the subject ordinance unconstitutional. For the reasons which follow, their requests will be denied.

DISCUSSION

Plaintiffs contend that the ordinance in question inhibits the exercise of First Amendment rights. They quote from Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1938), where it is said,

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

The Court in Hague, however, addressed itself to an ordinance dealing "only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and . . . not a general measure to promote the public convenience in the use of the streets or parks." It went on to say, "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the

interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

In A Quaker Action Group v. Hickel, D.C. App., 421 F.2d 1111 (1969), the court upheld a preliminary injunction enjoining the enforcement of an administrative regulation which prohibited groups of more than 100 people from demonstrating on Pennsylvania Avenue in front of the White House and groups of more than 500 from gathering in Lafayette Park across the street. In that case, however, the Circuit Court was greatly influenced by allegations that the permits which were required for all groups had been arbitrarily and capriciously refused to some applicants whose groups would number less than the maximum allowed by regulation.

Also, the plaintiffs in A Quaker Action Group v. Hickel submitted affidavits tending to show that groups larger than those permitted by the regulation could be accommodated without interfering with traffic and other justified activities. Here, there are no such affidavits. The only evidence offered by the plaintiffs in this vein is a statement made by Chief Pleasants to the City Council that the police could take care of 50 or 100 people in the Five Points area if the gathering were peaceful. This statement, however, comprehends the whole area known as Five Points, the park being only a corner of that area.

This ordinance does not attempt to restrict who may speak in the park nor to limit the topics about which a person might care to expound. Plaintiffs contend that in some circumstances a speaker might be forced to quit his speech or even be arrested if the audience swelled in numbers over 50 or possibly that some of a speaker's original audience might be forced to leave the premises or be arrested if the maximum number should be exceeded. In this way there is little doubt that free speech might be inhibited.

However, when crowds gather in limited spaces--especially within an area of heavy pedestrian and vehicular traffic--the group by mass and by mere physical presence can take on the characteristics of a demonstration or a parade. "Peaceful picketing and parading are methods of expression entitled to First Amendment protection, but they are methods subject to greater regulation than other forms of expression. This is not because marching as a means of communication differs in constitutional kind from 'purer' forms of speech, such as verbal expression, but because unlike verbal expression the form that parading takes more often than not brings it into competition with legitimate non-speech interests, which the state has a right to protect. When this occurs, accommodation of the competing interests involved often means that the right to parade must yield to reasonable state regulation of time, place, manner, and duration." Abernathy v. Conroy, 4 Cir., 429 F.2d 1170 (1970).

There is no allegation that plaintiffs or any other group are otherwise

limited in where they may meet, or that they could not obtain a permit to use the streets, or that they would not be allowed to make a reasonable use of the sidewalks. The Court takes judicial notice that there are other locations available in the vicinity, such as the ball park or the armory or--for nighttime use--public parking lots.

The Five Points intersection has been familiar to the Court for many years. Its geometric layout necessarily gives rise both to traffic and to pedestrian problems. Its location in the downtown area --the streets which cross in an "X" configuration are the two main arteries of Durham proper--further complicates the situation. Also, people are often gathered there to await the city buses which regularly stop to load and unload passengers.

Upon a balancing of the competing interests, it is found that the limitation questioned here is not unreasonably inhibitive of First Amendment Rights.

Accordingly, counsel for the defendants will forthwith prepare and present to the Court a proposed judgment, first submitting a copy to counsel for the plaintiffs.

/s/ Eugene A. Gordon
United States District Judge

April 21, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DURHAM DIVISION

JOHN W. BLASECKI, JR., et al.	)	
	)	No. C-84-D-70
Plaintiffs	)	
	)	
v.	)	JUDGMENT
	)	
CITY OF DURHAM, NORTH CAROLINA, et al.	)	
	)	
	)	
Defendants	)	

In accord with the Memorandum Opinion filed April 22, 1971, it is

ORDERED, ADJUDGED AND DECREED that the prayer for injunctive relief and for a judgment declaring the subject ordinance unconstitutional is hereby denied and that this action is dismissed with costs against the plaintiffs.

/s/ Eugene A. Gordon
United States District Judge

May 26, 1971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971
No. 71-1566

FILED
AUG 25 1972
MICHAEL RODAK, JR., CLERK

John W. Blasecki, Jr., William L. Broadon, Clark Cochrane, A. J. Howard Clement, III, William Harris, Harris C. Johnson, Morris King, Benjamin Ruffin, William Service, Elizabeth Tornquist, and William Towe,
Petitioners,

v.

City of Durham, North Carolina; Vance Fisher, Mrs. R. O. Everett, C. E. Boulware, Thomas M. Hunt, Allen D. Aldridge, W. T. Coman, Charles L. Steele, J. S. Stewart, Wade Cavin, Mrs. Dillard Griffin, Paul Alford, and W. A. Biggs, the Members of the City Council of the City of Durham, North Carolina; R. W. Grabarek, Mayor of the City of Durham, North Carolina; I. Harding Hughes, City Manager of the City of Durham, North Carolina; and W. W. Pleasants, Chief of Police of the City of Durham, North Carolina,
Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT

****

Claude V. Jones
Central Carolina Bank Building
111 Corcoran Street
Durham, N. C. 27701
Telephone: 919-682-5594
Counsel for Respondents

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ARGUMENT

I

The FIRST Amendment rights of Petitioners are not violated by the Ordinance in question.

The locus is a small triangular or wedge-shaped plot located at what is known as Five Points in Durham, North Carolina. Five Points is located in or near the center of the down-town area of Durham. As stated by the Circuit Court, Five Points is to Durham what Times Square is to New York. It is a busy, much used section of the City. Both pedestrian and vehicular traffic is heavy there. In addition to the normal pedestrian traffic which is found there, the area and adjacent sidewalks are extensively used by many people who wait for buses, since the Five Points Park area is a major bus stop in the City of Durham.

Main Street, Chapel Hill Street, and Morris Street, run into and across so as to form five points and the Five Points Park is located at the eastern triangle of this cross-way.

Just about three blocks north of this small park there is located (on Morris Street) an entire City block owned by the City of Durham, a portion of which is fenced in and used for baseball and other athletic contests, and a substantial portion unfenced and used for the parking of vehicles in conjunction with attendance at the ball park. Both the area inside

as well as outside the ball park may be used by the public for meetings of all kinds. The bloc will accommodate several thousand people and is lighted for night use.

Prior to the passage of the ordinance in question, there had been disruptive and destructive usages made of the Five Points Park. On one such occasion, some 300 people met there and burned a casket. A tree was set afire, and when the firemen sought to extinguish the fire the crowd locked arms and prevented them from doing so. The crowd broke water sprinkler heads, tore down shrubbery, and broke out and smashed glass store windows near the park. On another occasion in the same month in which the ordinance was passed, about 13 days prior to its passage, a crowd damaged shrubbery and sprinkle heads at the park and smashed glass store windo nearby.

The City Council passed the ordinance for the reasons therein recited in the exercise of its police power in promotion of the public safety, health, convenience and welfare.

No permit is required from the police or any one else to use Five Points Park.

No censorship is placed upon the content of speech at the Five Points Park.

No attempt is made either directly or indirectly to control or regulate the methods of exercising free speech at the Five Points Park.

The City Council had a compelling interest in the protection of property, and in preventing unreasonable congestion and uncontrolled blockage of traffic at Five Points.

As stated in Cox v. Louisiana, 379 U.S. 536, 544 (1965), "Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly". This is not a case of abridgement of the privilege of a citizen to use the streets and parks for political discussions in the guise of regulation. Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-516 (1939).

Instead of being repressive, the correspondence between the Chief of Police and Blasecki discloses an attitude of cooperation and willingness to assist plaintiffs in having their meeting at the Park.

Accommodation of competing interests involved often means that the right to parade must yield to reasonable state regulation of time, place, manner, and duration.

Abernathy v. Conroy, 4 Cir., 429 F 2d 1170 (1970)

As the District Court Judge below stated in his Memorandum Opinion in upholding the validity of the Ordinance:

> "There is no allegation that plaintiffs or any other group are otherwise limited in where they may meet, or that

they could not obtain a permit to use the streets, or that they would not be allowed to make a reasonable use of the sidewalks. The Court takes judicial notice that there are other locations available in the vicinity, such as the ball park or the armory or --- for nighttime use --- public parking lots.

The Five Points intersection has been familiar to the Court for many years. Its geometric layout necessarily gives rise both to traffic and to pedestrian problems. Its location in the downtown area --- the streets which cross in an "X" configuration are the two main arteries of Durham proper --- further complicates the situation. Also, people are often gathered there to await the City buses which regularly stop to load and unload passengers.

Upon a balancing of the competing interests, it is found that the limitation questioned here is not unreasonably inhibitive of First Amendment Rights."

Cameron v. Johnson (1968) 390 U.S. 611, 20 L. Ed. 2d 182, 88 S.Ct. 1335

Boyle v. Landry (1971) 401 U.S. 77, 27 L. Ed. 2d 696, 91 S.Ct. 758

Burton v. City of St. Louis (1970) 309 F. Supp. 1078

II

The Ordinance is not void for vagueness.

It is entirely proper for the City Council to place a reasonable limit on the number of people who can assemble in this Park. In holding that 50 was not an unreasonable limitation, the lower Court did not err.

Cox v. Louisiana, supra.

That interpretation of the ordinance which will permit upholding its constitutionality is to be chosen.

United States v. Harriss, (1954) 347 U.S. 612

III

Ordinarily, a federal court will not interfere with state court trial of criminal actions.

The Fourth Circuit said, in this case, that "It is also elementary that a United States Court cannot interpret authoritatively and finally a state criminal ordinance. We think it inappropriate that we should attempt interpretation because one of the special circumstances making abstention appropriate 'is the susceptibility of a state statute of a con-

struction by the state courts that would avoi or modify the constitutional question".

Zwickler v. Koota (1967) 389 U.S. 241, 249

It is a familiar rule that courts of equ do not ordinarily restrain criminal prosecuti No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violat of constitutional guaranties, is not a ground for equity relief since the lawfulness or con stitutionality of the ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Douglas v. City of Jeannette (1943) 319 U.S. 157, 87 L. Ed. 1324, 63 S.Ct. 877

Younger v. Harris (1971) 401 U.S. 37, 27 L. Ed. 2d 669, 91 S.Ct. 746

Golden v. Zwickler (1969) 394 U.S. 103

CONCLUSION

For the reasons stated above, and others contained in the decision handed down by the Fourth Circuit Court of Appeals, Respondents respectfully submit that the Petition for Writ

of Certiorari should be denied.

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